Supreme Court, U. S.
FILED
JUL 3 1978
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

No. 78-4

EARL M. POPE, DOLORES POPE, EDWIN E. POPE, DOLORES O. POPE, EDITH POPE,

Petitioners,

v.

CINCINNATI GAS & ELECTRIC CO., DAYTON POWER & LIGHT CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

ROBERT E. MANLEY

4500 Carew Tower
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Attorney for Petitioners

JOSEPH R. JORDAN
TIMOTHY A. FISCHER

4500 Carew Tower
Cincinnati, Ohio 45202

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

TABLE OF CONTENTS

	Page
JURISDICTION	1
QUESTION PRESENTED	2
Whether the Ohio eminent domain laws deny a property owner due process of law by providing that a judgment upholding a condemning authority's right to take private property is, under § 163.09 (B), Ohio Revised Code, not final and reviewable where, under § 163.15, Ohio Revised Code, that judgment, after a subsequent valuation hearing, gives the condemning authority the immediate right to take possession of the property, which right, under § 163.19, Ohio Revised Code, cannot be stayed pending appeal.	
CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED	2
STATEMENT OF THE CASE	4
REASONS TO ALLOW WRIT	7
CONCLUSION	18

APPENDIX

	Page
The Cincinnati Gas & Electric Co., et al. v. Earl M. Pope, et al., Hamilton County Court of Common Pleas, No. A-751384; and	
The Cincinnati Gas & Electric Co., et al. v. Edwin E. Pope, et al., Hamilton County Court of Common Pleas, No. A-751385; and	
The Cincinnati Gas & Electric Co., et al. v. Edith Pope, Hamilton County Court of Common Pleas, No. A-751386	
Opinion (January 18, 1977)	1a-10a
Entry (February 8, 1977)	10a-11a
The Cincinnati Gas & Electric Co., et al. v. Earl M. Pope, et al., Court of Appeals, First Appellate District, Hamilton County, Ohio, No. C-77107; and	
The Cincinnati Gas & Electric Co., et al. v. Edwin E. Pope, et al., Court of Appeals, First Appellate District, Hamilton County, Ohio, No. C-77113; and	
The Cincinnati Gas & Electric Co., et al. v. Edith Pope, Court of Appeals, First Appellate District, Hamilton County, Ohio, No. C-77114	
Entry of Dismissal (May 3, 1977)	12a
The Cincinnati Gas & Electric Co., et al. v. Pope, et al., Supreme Court of Ohio, No. 77-695	
Opinion (April 5, 1978)	13a-21a

	Page
§ 1.47 Ohio Revised Code	22a
§ 163.08 Ohio Revised Code	22a
§ 163.09 Ohio Revised Code	22a-24a
§ 163.14 Ohio Revised Code	24a-25a
§ 163.15 Ohio Revised Code	25a-26a
§ 163.19 Ohio Revised Code	26a
Chapter 39, Magna Charta	26a

TABLE OF CASES

Adams v. *Snouffer*, 88 Ohio App. 79, 44 Ohio Op. 17 (1949)	10
Armstrong v. *Manzo*, 380 U.S. 545 (1965)	8
Boddie v. *Connecticut*, 401 U.S. 371 (1971)	17
Buchalter v. *State of New York*, 319 U.S. 427 (1943)	13
Cincinnati Gas & Electric Co. v. *Pope*, 54 Ohio St.2d 12 (1978)	1, 6, 11, 14, 16, 17
Griffin v. *Illinois*, 351 U.S. 12 (1956)	14
Harper v. *Virginia State Bd. of Elections*, 393 U.S. 663 (1966)	17
Holden v. *Hardy*, 169 U.S. 366 (1898)	12
Memphis Light, Gas & Water Div. v. *Craft*, — U.S. —, 56 L.Ed.2d 30 (1978)	13

Page

Missouri Pacific R. Co. v. *Humes,* 115 U.S. 512 (1885) 12

Nashville I-40 Steering Comm. v. *Ellington,* 387 F.2d 179 (6th Cir.), *cert. denied,* 390 U.S. 921 (1967) 11

Stanley v. *Illinois,* 405 U.S. 645 (1972) 16

State ex rel. v. *Guilbert,* 56 Ohio St. 575 (1897) .. 12

TABLE OF OTHER AUTHORITIES

Chapter 39, Magna Charta 12

Article I, § 16, Ohio Constitution 3, 6

Article I, § 19, Ohio Constitution 3, 6, 9, 13

Chapter 163, Ohio Revised Code 5, 7, 9, 11, 14, 16

§ 1.47 Ohio Revised Code 3, 15

§ 163.08 Ohio Revised Code 3, 9

§ 163.09 Ohio Revised Code 2, 3, 7, 8, 9, 11, 15

§ 163.14 Ohio Revised Code 3, 9

§ 163.15 Ohio Revised Code 2, 3, 7, 10

§ 163.19 Ohio Revised Code 2, 7, 10, 15, 17

28 U.S.C. § 1257 (3) 2

Amendment V, United States Constitution 12

Amendment XIV, United States Constitution 2, 6, 12, 13

Article VI, cl. 2, United States Constitution 2, 13

IN THE

SUPREME COURT OF THE UNITED STATES

No. ———

EARL M. POPE, DOLORES POPE, EDWIN E. POPE, DOLORES O. POPE, EDITH POPE,

Petitioners,

v.

CINCINNATI GAS & ELECTRIC CO., DAYTON POWER & LIGHT CO.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

This petition seeks review of *Cincinnati Gas & Elec. Co.* v. *Pope,* 54 Ohio St.2d 12 (1978), affirming *Cincinnati Gas & Elec. Co.* v. *Pope,* Case Nos. C-77107, C-77113, C-77114, Court of Appeals for the First Appellate District, Hamilton County, Ohio, May 3, 1977, both appended hereto.

JURISDICTION

The decision sought to be reviewed is dated and was entered by the Supreme Court of Ohio on April 5, 1978. No rehearing or extension of time within which to petition for writ of certiorari was sought or granted.

Jurisdiction is conferred upon this Court to review the judgment in question by 28 U.S.C. § 1257 (3).

QUESTION PRESENTED

Whether the Ohio eminent domain laws deny a property owner due process of law by providing that a judgment upholding a condemning authority's right to take private property is, under § 163.09 (B), Ohio Revised Code, not final and reviewable where, under § 163.15, Ohio Revised Code, that judgment, after a subsequent valuation hearing, gives the condemning authority the immediate right to take possession of the property, which right, under § 163.19, Ohio Revised Code, cannot be stayed pending appeal.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

CONSTITUTION OF THE UNITED STATES:

ARTICLE VI

Clause 2 This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

AMENDMENT XIV

§ 1 All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside.

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CONSTITUTION OF THE STATE OF OHIO (1851):

ARTICLE I

§ 16 All courts shall be open, and every person, for an injury done him in his land, goods, person, or reputation, shall have remedy by due course of law, and shall have justice administered without denial or delay.

Suits may be brought against the state, in such courts and in such manner, as may be provided by law.

§ 19 Private property shall ever be held inviolate, but subservient to the public welfare. When taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, a compensation shall be made to the owner, in money, and in all other cases, where private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefits to any property of the owner.

OHIO REVISED CODE:

Section 1.47, Ohio Revised Code.
Section 163.08, Ohio Revised Code.
Section 163.09, Ohio Revised Code.
Section 163.14, Ohio Revised Code.
Section 163.15, Ohio Revised Code.

The complete texts of the above-cited sections of the Ohio Revised Code are appended hereto.

STATEMENT OF THE CASE

This action arises out of an attempt by two Ohio electric utility companies, the Cincinnati Gas & Electric Co. and the Dayton Power & Light Co., to acquire private property in an appropriation proceeding under Ohio Revised Code Chapter 163.

These proceedings began in February of 1975 when the two Respondent utility companies, the Cincinnati Gas & Electric Co. and the Dayton Power & Light Co., filed three separate complaints against Earl and Dolores Pope, Edwin and Dolores O. Pope, and Edith Pope, Petitioners herein, as owners of three contiguous parcels of property located in southwest Hamilton County, Ohio. By these complaints, the Respondents sought to acquire an easement across the properties of the Petitioners for the purpose of constructing a high-voltage (345,000 volt) transmission line. The three cases were consolidated for the purposes of trial and of appeal, and no further distinction need be made among them.

After almost three years from the time of the filing of the complaints, the cases were tried to the Court of Common Pleas of Hamilton County in September of 1976, and (after a denial of the Respondents' motion for a directed verdict) in January of 1977, consuming approximately ten trial days. On January 18, 1977, the court entered an oral opinion ruling that the Respondents were entitled to appropriate the easements which they sought.[1] The judg-

[1] Appendix, p. 1a.

ment entry determining the right to take further ordered that "this case be set for trial by a jury as provided by law" on the question of valuation.[2]

Petitioners filed notices of appeal from this judgment on February 11 and February 15, 1977. On March 21, 1977, the Respondent utility companies filed a motion to dismiss the appeals. In their memorandum contra and in oral argument before the Courts of Appeals, Petitioners argued that dismissal of the appeals would deny them due process of law. On May 3, 1977, the Court of Appeals for the First Appellate District, Hamilton County, Ohio granted Respondents' motion to dismiss the appeals.[3]

The Petitioners filed a timely motion asking the Supreme Court of Ohio to take jurisdiction of the cases. To the Supreme Court of Ohio the Petitioners presented the following proposition of law which involves a constitutional question of due process:

> "An Order of the Court of Common Pleas in an Appropriation Proceeding Brought Pursuant to Chapter 163 of the Ohio Revised Code Determining the Issue of Necessity Adversely to the Property Owner Is a Final and Appealable Order."

In support of this proposition of law Petitioners argued,

> "The decision of the Court of Appeals in this case to dismiss the [Petitioners'] appeal denies to property owners fundamental elements of due process. The right to protect one's property and to defend against arbitrary and unlawful appropriations is a right which has been recognized as paramount." Memorandum in Support of Jurisdiction, p. 12.

[2] Appendix, p. 10a.

[3] Appendix, p. 12a.

The Supreme Court of Ohio accepted jurisdiction of the consolidated cases on September 9, 1977. The due process question was briefed by Petitioners and Respondents. The Supreme Court of Ohio heard oral argument on January 30, 1978.

On April 5, 1978, the Supreme Court of Ohio affirmed the dismissal of Petitioners' appeals by the Court of Appeals.[4] In its opinion, the court rejected Petitioners' arguments that the dismissal of their appeals was unconstitutional and denied them due process of law.[5] It is on this decision of the Supreme Court of Ohio affirming the dismissal of Petitioners' appeals that a writ of certiorari is herein sought.

The Facts

The facts which were presented to the Court of Common Pleas concerning the question of whether the Respondent utility companies had abused their discretion and had acted in bad faith in condemning the Petitioners' property are not relevant to this petition. The only issue is whether the Petitioners may appeal the Respondents' right to take at this time.

The only relevant facts are procedural facts, which of course, are uncontested and a matter of record. Specifically, the relevant facts are that a hearing was held in the Court of Common Pleas to determine the question of the Respondents' right to take the property which they sought to condemn. After a lengthy evidentiary hearing, that court ruled for the Respondents. The Petitioners appealed to the Court of Appeals from the judgment. The Court of Appeals dismissed those appeals upon motion of the Respondents. The Supreme Court of Ohio affirmed the dismissal of the appeals.

Section 163.09 (B), Ohio Revised Code, specifically provides that a decision adverse to a property owner at this stage of an appropriation action is not a final order. Therefore, under Ohio law Petitioners may not appeal Respondents' right to take until such time as, under § 163.15, Ohio Revised Code, Respondents have the right of possession of the property. Another section, § 163.19, provides that, during that appeal, the court has no power to stay the construction activities which may be undertaken during the pendency of the appeal, even if that activity involves, as it does here, irreversible damage to a fragile hillside. Petitioners question the constitutionality of that restriction on the timing of an appeal of Respondents' right to take Petitioners' property by appropriation.

REASONS TO ALLOW WRIT

This petition asks this Court to review the constitutionality of the statutory appeal provision contained in Chapter 163 of the Ohio Revised Code applicable to actions for the taking of private property be eminent domain in Ohio. Petitioners contend that the provision in § 163.09 of the Ohio Revised Code upon which the Court of Appeals apparently relied in dismissing Petitioners' appeal is an unconstitutional provision which acts to deprive Petitioners

---

[4] *Cincinnati Gas & Electric Co., et al.* v. *Pope, et al.*, 54 Ohio St.2d 12 (1978).

[5] In response to Petitioners' argument that the Ohio appellate procedures in appropriation cases denied them due process of law guaranteed by the Fourteenth Amendment of the United States Constitution and art. I, § 16 of the Ohio Constitution, the Ohio Supreme Court stated:

> "The due process of law to be observed whenever private property is appropriated for public use is set forth in Section 19, Article I of the Ohio Constitution, ..." 54 Ohio St.2d at 18.

of the only meaningful appeal of an adverse decision which they will ever be able to make at a meaningful time and in a meaningful manner. *Armstrong* v. *Manzo,* 380 U.S. 545, 552 (1965).

In its affirmance of the dismissal of Petitioners' appeals, holding constitutional the mandatory delay for appealing the issue of the right of the condemning authority to appropriate the property until after the valuation hearing and transfer of the property, the Supreme Court of Ohio has in effect eliminated the right to any real judicial review of the appropriation of private property in the courts of Ohio.

This case presents to this Court a rare opportunity to determine the extent of the constitutional due process deprivations in the appellate procedure mandated by Ohio law in eminent domain actions. The issue raised by this petition can only be presented for review in the procedural posture of this case, namely that of a property owner seeking immediate review of an adverse ruling on the issue of the condemning authority's right to take in the face of a statutory prohibition against an appeal at this stage of an appropriation action.

It is submitted that only review by this Court of the judgment of the Supreme Court of Ohio can bring Ohio's procedures of appellate review of appropriation of private property into accord with the due process of law guaranteed to owners of private property under the Fourteenth Amendment to the Constitution of the United States.

The Ohio Eminent Domain Proceeding

Section 163.09 of the Ohio Revised Code appears to provide for a review of a judgment adverse to the property owner, but, in operation in connection with other re-

quirements of Chapter 163, actually eliminates the power of the Court of Appeals to effectively review a judgment in an appropriation case adverse to the property owner on the question of necessity and to provide relief to the property owner.

Chapter 163 of the Ohio Revised Code establishes a bifurcated procedure in eminent domain cases. If a property owner wishes to show that the appropriating authority has abused its discretion, has acted in bad faith, or has otherwise violated the constitutional provisions of § 19 of Article I of the Constitution of the State of Ohio, or is otherwise legally incompetent to condemn the property sought, the property owner is first required to raise those defenses in an answer.[6] Those factual issues are then tried to the Court of Common Pleas, sitting without a jury.[7] If the Court of Common Pleas enters judgment for the defendant property owner, that order terminates the case and is obviously a final and appealable order for the purposes of appeal. However, if the Court of Common Pleas determines the issues adversely to the property owner and holds that the condemning authority may proceed, then Ohio law specifically provides that such an order "in favor of the agency [utility company] on any of such questions [of necessity] shall not be a final order for purposes of appeal."[8] Rather, the case continues and the matter is referred to a jury, which then proceeds to determine the value of the property in order to compensate the property owner.[9]

---

[6] § 163.08, Ohio Rev. Code.

[7] § 163.09(B), Ohio Rev. Code.

[8] § 163.09(B), Ohio Rev. Code.

[9] § 163.14, Ohio Rev. Code.

The end product of that procedure is a judgment entry which not only reflects the jury's determination and orders a specified compensation to be paid to the defendant, but is also a certificate of title which transfers ownership of the parcel sought to be condemned (or of a lesser interest, such as an easement) to the plaintiff utility company.[10] Only after all of this has been accomplished, including the actual transferral of ownership, does the statutory procedure contemplate an appeal to the Court of Appeals. Finally, Ohio law provides specifically that the pendency of an appeal after the valuation hearing may not affect the condemning authority's right to use the condemned land during the appellate process.[11]

For obvious reasons, this is the procedure which Respondents would prefer to follow in this case. This procedure denied to Petitioners any right to have their case reviewed until after the valuation hearing and until after their property has been transferred to the utility company. Of course, once the utility company owns the parcel or the easement, construction work upon the project can begin.[12]

Obviously, considering the time ordinarily consumed in processing a case upon appeal, even if expedited, the utility companies can have the project which is contemplated for the properties involved completed long before an appellate court is in any position to review this case. At that time, any meaningful relief would be impossible to grant the property owners. The alteration of real estate is generally considered an irreparable injury. *Adams* v. *Snouffer*, 88 Ohio App. 79, 44 Ohio Op. 17 (1949).

---

[10] § 163.15, Ohio Revised Code.

[11] § 163.19, Ohio Rev. Code.

[12] § 163.19, Ohio Rev. Code.

The Supreme Court of Ohio has acknowledged the potential for injury to the Petitioners' property under the appellate review procedures contained in Chapter 163, Ohio Revised Code.

> "[W]e recognize that because of the balance struck within R. C. 163.19 there is the possibility that the contested property might be damaged by the appropriating agency after it acquires title thereto under R. C. 163.15, only to be later restored, in this damaged condition, to the property owner who successfully appeals the preliminary issues." 54 Ohio St.2d at 19.

The comment of the Supreme Court of Ohio as to the availability of expedited appeallate review after the valuation hearing and the transfer of the property hardly serves to cure the defect of the lack of finality of an order under § 163.09 (B).[13] This proffered solution cannot prevent irreparable damage to Petitioners' real property during the pendency of an expedited appeal, nor has the Supreme Court of Ohio dealt with the problem of judicial reluctance to halt a construction project once it is underway. See *Nashville I-40 Steering Comm.* v. *Ellington*, 387 F.2d 179 (6th Cir.), *cert. denied*, 390 U.S. 921 (1967).

Petitioners believe it is clear that Ohio's statutory appellate procedures for appropriation actions is structured in such a way as to moot an appeal on the condemning authority's right to take before the appeal can be heard or

---

[13] "It is therefore imperative that the property owner who prosecutes an appeal on other than the jury award of compensation adequately inform the appellate court of his dilemma, so that the appellate court might implement the special provision of Ohio Revised Code § 163.22, which mandates that '[a]ll proceedings brought under sections 163.01 to 163.22, inclusive, * * * shall be advanced as a matter of immediate public interest and concern and shall be heard by the court at the earliest practicable moment.'" 54 Ohio St.2d at 19

decided. It is submitted that this statutory appellate procedure violates the due process clause of the Fourteenth Amendment to the Constitution of the United States.[14]

Denial of Due Process

Due process of law is one of the central concepts of Anglo-American constitutional law. From the origins of our system of law, private property has been protected from being taken by the powers of the sovereign. Article 39 of the Magna Carta (1215) provided that no man be deprived of his freehold unless by the lawful judgment of his peers and by the law of the land.[15] The phrase "by the law of the land" is synonymous with the phrase "due process of law." *Holden* v. *Hardy*, 169 U.S. 366 (1898); *State ex rel.* v. *Guilbert*, 56 Ohio St. 575, 616 (1897).

This protection is embodied in the due process clauses of the Fifth and Fourteenth Amendments of the Constitution of the United States. The words "due process of law" are intended to guarantee not only that the individual be free from the arbitrary deprivation of life or liberty by the power of the state, but also to guarantee to the individual that he be free from the arbitrary spoilation of property. *Missouri Pacific R. Co.* v. *Humes*, 115 U.S. 512 (1885). The due process clause of the Fourteenth Amendment

---

[14] It should be emphasized that the constitutional restriction against the taking of private property except in accordance with due process of law should be distinguished from the restriction against the taking of private property without compensation. The two restrictions are different, and the right to be compensated by the state for the taking of property is not a right which is involved in this appeal. The constitutional deprivations which form the basis for this appeal pertain solely to the fact that the State of Ohio has established procedures whereby land may be appropriated in violation of minimal due process guarantees.

[15] Appendix, p. 26a.

guarantees that any action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions. *Buchalter* v. *State of New York*, 319 U.S. 427, 429 (1943). And while personal and criminal rights have received much recent judicial attention, the protection of property rights by due process of law has been reaffirmed by this Court.

> "The Fourteenth Amendment places procedural constraints on the actions of government that work a deprivation of interests enjoying the stature of 'property' within the meaning of the Due Process Clause." *Memphis Light, Gas & Water Division* v. *Craft*, —— U.S. ——, 56 L.Ed. 2d 30, 39 (1978).

The Supreme Court of Ohio erred in its determination of what process is due a property owner after a decision adverse to the property owner on the question of whether the condemning authority had the right to appropriate the property. The Court stated:

> "The due process of law to be observed whenever private property is appropriated for public use is set forth in Section 19, Article I of the Ohio Constitution . . . ."

The Supreme Court of Ohio, while ostensibly responding to Petitioners' argument that they had been denied due process guaranteed by the Fourteenth Amendment of the United States Constitution, interposed a provision of the Ohio Constitution by way of answer; the Ohio Supreme Court thereby ignored art. VI, clause 2 of the Constitution of the United States.

> "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Au-

> thority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."

It is submitted that a provision of the Ohio Constitution cannot be used to cut off rights guaranteed Petitioners under the Constitution of the United States.

While it is true that Ohio need not provide any appeal at all from an adverse decision in an appropriation action, this Court has held quite clearly that once a state grants the right of appellate review, it must grant that right equally to all. *Griffin* v. *Illinois,* 351 U.S. 12 (1956). It is apparent here that those who are deprived of an effective right of appellate review in proceedings pursuant to Chapter 163 of the Ohio Revised Code are only those who choose to contest the validity of the appropriation. (Those who contest only value are provided a full appeal, the result of which is capable of execution.) The State of Ohio appears to provide Petitioners with an appeal, but that appeal can have no effect and a reversal is incapable of execution because the property will long since have been irreparably damaged.

> "The State is not free to produce such a squalid discrimination. . . . The State cannot keep the word of promise to the ear of those illegally convicted and break it to their hope." *Griffin* v. *Illinois,* 351 U.S. 12, 24 (1956) (Mr. Justice Frankfurter, concurring).

Thus the statement by the Ohio Supreme Court that "[t]his court has repeatedly stated that there is no inherent right of appeal from a judgment of a court, and that such right must be conferred by Constitution or statute" (54 Ohio St.2d at 18) does not deal with the question of

whether due process is denied if the appellate procedure provided by state law is a meaningless exercise.

In any event the Ohio legislature *has* granted property owners the right to appeal from an adverse ruling on the question of the plaintiff's right to take property by the power of eminent domain. Under the rules of statutory construction it must be presumed that the Ohio legislature intended that appeal to be a meaningful appeal, or the legislature would not have provided for any appeal at all.

> "In enacting a statute, it is presumed that: . . .
>
> "(C) A just and reasonable result is intended;
>
> "(D) A result feasible of execution is intended."
>
> Section 1.47, Ohio Revised Code.

If Petitioners' appeal is delayed until after the valuation hearing by operation of Section 163.09(B), Ohio Revised Code, then, under Section 163.19, Ohio Revised Code, Respondent utility companies will have the right to irrevocably alter and significantly damage the Defendants' property by constructing upon it a series of large towers to support a very high-voltage electric transmission line. The effect of this procedure is to discourage appeals, even in meritorious cases, since a property owner will not wish to bear the cost of an appeal which will not provide any meaningful relief. Thus, the state has granted only the appearance of due process and has in fact stacked the appellate deck against the property owner to such an extent that his only reasonable option, under the state's rules, is to drop out of the game.

The Fourteenth Amendment of the United States Constitution provides that a deprivation of property is to be

accorded the same due process protections as a deprivation of life or a deprivation of freedom, and yet it would be absurd to suggest that justice would be served or due process guarantees realized by providing a defendant convicted of capital crime with the full rights to an appeal only after the sentence of execution has been carried out. Similarly, a property owner who is denied the right to appeal an appropriation of his property until after possession is transferred to the condemning authority has clearly been denied due process of law.

The only justification advanced for the mandatory delay in appealing the condemning authority's right to take Petitioners' property is "speedy construction" of a public project. 54 Ohio St. 2d 12, 18.[16] The statutory procedures contained in Chapter 163 constitute the elevation of expeditious procedure over the rights and interests of the citizens and property owners of the state. This Court has noted repeatedly that the Constitution of the United States recognizes higher values than speed and efficiency. *Stanley* v. *Illinois,* 405 U.S. 645, 656 (1972). Petitioners submit that it is not rational to sanction "speedy construction" of a public project while acknowledging that the transfer of the condemned property to the appropriating agency is "subject to defeasance" should the property owner prosecute a successful appeal. 54 Ohio St. 2d 12, 19.

In addition, the long jury trial on land valuation is a significant use of judicial resources and should not be required until an appellate court has first determined that

[16] The Ohio Supreme Court clearly overlooked the fact that the Respondent utility companies in this case are hardly in a position to urge that the case proceed expeditiously inasmuch as they waited almost two years after filing the case before trying it, despite the fact that Chapter 163 provides that such cases may be tried within fifteen days of the filing of the answer.

the plaintiff does have the right to condemn the property.[17] The burden on the appellate process is less than the burden imposed on the trial process, which compels the parties, the trial courts, and juries to determine the value of a parcel which may well prove to be unnecessary by an adverse appellate ruling.[18] It is submitted that there is no rational basis for use of the substantial judicial resources which a jury trial on valuation would entail before it is certain that any compensation is to be paid; if Respondents have no right to take the property, then Petitioners have no right to be compensated.

Finally, the conventional remedy of a stay pending appeal is also denied to the Petitioners by § 163.19 of the Ohio Revised Code, which provides that once the condemning authority pays to the property owner or pays into court the amount of the award assessed by the jury, "the right to take and use the property appropriated shall not be affected by such review by the appellate courts.[19]

[17] The Ohio Supreme Court has erroneously characterized the Respondents' right to take Petitioners' property as a preliminary issue. 54 Ohio St.2d 12, 19. The right to take is by no means preliminary, but rather is the ultimate issue.

[18] This is especially true where the Court of Common Pleas specifically noted that "although I have had a number of difficult decisions, this has been one of the most difficult. I have made my mind one way and then I've rethought and tried to write it out one way in my mind and then I've changed my mind, and I've done that several times." Appendix, p. 2a.

[19] Even if a stay pending appeal were available, the supersedeas bond required of the Petitioners would not be measured by the value of the interest taken or by the jury's determination of value; rather, the Respondents would surely argue that the bond must be measured by the value of the project which is enjoined and the harm caused to the Respondents thereby. In any event, regardless of the measure of the bond, constitutional rights may not be premised upon the payment of a fee. *Harper* v. *Virginia State Bd. of Elections,* 393 U.S. 663 (1966). This is particularly true where the due process deprivation complained of involves a question of access to the courts. *Boddie* v. *Connecticut,* 401 U.S. 371, 375 (1971).

There exists no rational basis for the deprivations inherent in Ohio's statutory procedure, which provides a person an appeal in an appropriation case only after the property which he is trying to protect has been irrevocably altered or destroyed. It is neither just nor reasonable for the state to provide a party an appeal when the reviewing court no longer has the power to effectuate its judgment. The protection of private property is the keystone of Anglo-American law. Accordingly, it is submitted that this case, involving as it does the right of property owners to protect their property rights before the property is altered or destroyed, is a case of significant public interest which this Court should decide.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this petition for writ of certiorari should be granted.

Respectfully submitted,

ROBERT E. MANLEY

4500 Carew Tower
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

Attorney for Petitioners

JOSEPH R. JORDAN
TIMOTHY A. FISCHER

4500 Carew Tower
Cincinnati, Ohio 45202

APPENDIX

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

THE CINCINNATI GAS AND ELECTRIC COMPANY,

Plaintiff,

vs.

THE DAYTON POWER AND LIGHT COMPANY,

Defendant.

Case Nos. A-751384-5-6

JUDGE GILBERT BETTMAN

JUDGE'S DECISION

APPEARANCES:

C. R. Beirne, Esq.,
Counsel for Plaintiff,

Timothy A. Fischer, Esq.,
Counsel for Defendant.

MORNING SESSION, TUESDAY, JANUARY 18, 1977

JUDGE'S DECISION

THE COURT: After all the careful detailed and complete work that has been done by counsel for both sides

in this case, the Court would like to have had the chance to prepare a tightly reasoned and complete opinion covering all the points that you have raised, both legally and factually. Unfortunately, time simply doesn't permit my doing that, and, therefore, I'm going to have to speak more or [2] less as it comes out.

As you know, I followed the evidence carefully, throughout these number of days that we have tried the case. I've listened to your arguments and I have studied your briefs. In addition to that, I went out a couple of weeks ago and spent a few hours driving around through the area, just to refresh my recollection as to the, as to make the evidence more clearly, by renewing my view.

I have to say to you that this has been, although I have had a number of difficult decisions, this has been one of the most difficult. I have made my mind one way and then I've rethought and tried to write it out one way in my mind and then I've changed my mind, and I've done that several times. The problem, obviously, of balancing individual rights and general community needs is exemplified by the need to, for electrical power. That is a difficult balance to try to achieve.

I might say I started with some background. None of us are without our lifetime experiences. I grew up with a house with a riverview which my father and all of us were very fond. I also got myself into a position back in the forties of being a chairman of the Citizens Committee to save Burnett Woods and keep the University from encroaching any further on it. So that my initial reaction to this case [3] was it just seemed a shame to run a transmission line along the side of this quite beautiful, rich land, overlooking the White Water Valley.

Furthermore, it was obvious in the evidence, which has made it even more real by view of the premises, as Mr.

Pope has put it himself, I think quite correctly, the Great Miami Valley, in that area, is already, from an environmental point of view, the defiled talks of putting a park there, or making it into a recreational area, or an unrealistic dream.

The Gulf Refinery Company is there, it is going to be there, probably, more or less, forever, for our purpose. The gravel pits are going to be there another 30 or more years. It is a pretty junky valley.

Having had those initial thoughts, I again reviewed what the law is, and of course, we are governed by 163.09 (B), that the necessity, decision of the Gas and Electric Company is prima facie evidence in the absence of proof of the abuse of discretion.

And the Ohio cases that interpreted this, as you all are familiar, and I'm not going to burdon your with reading much of them, but to take the Cleveland Electric Illuminating versus Lesher, it was the Court of Appeals that reversed Judge Locher.

The Court said, "The Burdon is upon the defendant to prove that the proposed route is so defective they could [4] not have been the result of a reason in good faith in the exercise of discretion."

The Court of Appeals for our district, in the Nieman case, with which you are all familiar, says, "Where two lines for an electric transmission line are possible, it is discretionary with appropriating agency to select the route it will follow, and in the absence of fraud, bad faith or gross abuse of discretion, such determination will not be disturbed by the Court."

And then it goes on to quote some other authorities, "In the absence of legislative restriction and delegation of the power of Eminent Domain gives the grantee the power, the right to determine the location and route of

the improvement, and of the land to be taken for it, and such determination will not be interfered with by the Courts if it is made in good faith, and is not capricious or wantingly injurious evidence that another route is feasible is not sufficient to show that the grantee's selection constitutes bad faith, oppression or abuse of power."

So, as you all know, the Court is not free to make its own determination as to what the best route is. The issue is whether the defendants have established, by preponderance of the evidence, that the Gas Company's selection of this route is an abuse of discretion.

[5] If the test was that the Gas and Electric Company's route is not as good as one of the alternatives, I wouldn't have much trouble in finding in favor of the defense because I think almost any one of these other routes, as far as I personally would think, almost any one of them, or some combination or variation of the alternatives discussed in the evidence would be better.

Mr. Beirne, I think, put it well in his brief, "The sole issue is whether the particular reasons the utility had for its determination of necessity reveal that it failed to undertake a good faith effort to determine the necessity for the appropriation."

In weighing the evidence before us, in trying to reach this decision, I think we are all in agreement that the decision calls for a weighing of all the factors involved, environmental factors, engineering factors and economical factors. Unfortunately, there are many many facets to each of these problems.

How much visibility will the line have from this direction, from that direction, from this road, from that road. How much does it cost to put in a foundation on this kind of a slope, or in this river bottom, or here, or there. How many people will be put out by putting a line in this

direction, or that direction. What will the cost be to do this, or to do that.

[6] There's a huge number of factors and it's not a mathmatical problem to determine their comparative weight.

I might personally give one. Give great weight to the fact that you have to destroy some wooded area. Someone else may feel, well, it's much better to destroy a wooded area than it is to destroy a house, or to move a house. These are judgments.

The route that the gas company chose appears, from the evidence, to be straight, which is obviously economical not to displace any residences or businesses. It does have some screening or backdrop from different points of view.

The principal points that the defendants make is that, well, number one, that the building of the long line proposed pad will destroy a number of views from the edge of the ridge and I do think this is a very important environmental consideration and I think it is a consideration more than simply involving the Pope's individually, but involving, in the broad sense, the general welfare in that it is important to our society that properties with nice views not be destroyed.

However, we have to realize, in considering this, that we are not running a line now along over Columbia Parkway, which would run along all the front houses with Nolen, [7] Grandin Road, et cetera, we are running it along a line where there are presently no houses and it certainly is true that only a limited number of houses could be put along this ridge line. Only the ones that would be actually on the ridge line would have a view. There's a lot of flat area there. Once you get away from the rim the houses aren't going to have anymore view than any house with a wooded area. Maybe when they walk out of

their houses and go to the end of the street, yes. Otherwise, they wouldn't have any view that they could see out of a picture window.

That's one thing to remember. Another thing to remember is I don't think the evidence is entirely clear of exactly what the elevation of each point of this line is going to be along the line, or where exactly where the polls are, at least I haven't related them, but, it will be possible, I'm sure, in the development of this hilltop to adjust to some degree the location of your houses so they are not. You obviously aren't going to put one right behind the polls if the poll is sticking up behind that point.

Considering the thing from a broad point of view, too, although as I say, I think it is relevant that we are destroying some views with this line, and this is not the only location in Hamilton County where you can find locations with views, particularly in this day and age, with the opening of all these new super highways, it's easy to get [8] further out to the county and even beyond the county.

Second point that the defendants raised is this business of creation of a hiatus area. And, certainly I think that that concept is a sound concept. But, it is also true and I think it's obviously true that you are perfectly able to develop residential housing if that's what the best use for that area is in this so-called hiatus area. It isn't something which is completely destroyed for use, particularly in an area like this hilltop where you have quite a number of trees and with sound careful development so to preserve those trees, you could have a much nicer subdivision than some of the ones we saw in the pictures.

The third point the defendants raised was the problem of erosion. The conclusion that I couldn't help coming to, after hearing all the testimony on that is no question

we have erosion problems in this area on hillsides and specifically on this particular hill. But, what you are doing here is not the problem on these erosion hillsides, as I understand the evidence is that if you make a cut you then release the support of some of the slippage pressure and if you put a fill on the bottom side, you then add to the load which creates additional slipping going the other way.

Now, in the construction of these bases for [9] these towers I see no reason at all, and I think the evidence shows, supports this, shows us why we cannot take into account the fact that you have this certain type of geological hill and once you have placed your concrete in there and restore the slope to its natural slope why no reason at all why it shouldn't be just as nonslipable as it was before it went in. And, it would certainly create less of a slippage problem than the road going up the hill, which has to stay by its very nature, has to remain in the cut and fill condition.

The fourth point that was raised was the visibility from the new 275 which James Hough and Associates didn't include in their figures, how much weight this kind of thing should be given. I don't know, 275 is pretty far away, number one. Number two, the proposed route will, in affect, create the hill and the trees will create a backdrop for the poll line which, of course, reduces considerably his visibility from that distance.

Now, against the points that the defendant raised, the company had to weigh a great number of aspects and I'm not going to repeat them all, I had too much evidence. It's a problem of longer lines, there's a problem of visibility from this road, or that road. There are the same kind of erosion problems if you go over the hill near Hooven, or if you go around the hill a different way, if you

put the route [10] up through the valley you have certain kind of foundation problems. You again place the thing more out in the open so it is more visible. We had economic problems. There are a great many considerations that the gas company had to take into account in making its determination. I don't think there's much doubt human nature being what it is that having made their initial determination that they wanted the line to run in a certain, along a certain route, that it became psychologically difficult for them to change. Perhaps it is a little like getting a judge to reverse his decision on rehearing. But, after reviewing all of the evidence, I've concluded that they tried.

As I eluded to before, and this is a judgment call involving an infinite number of variables, and how you weigh what weight you give for example to the loss of a good view from a prospective building site, what weight you give that compared to, for example the high visibility of the line going through the center of a valley. I just don't really know. I don't think one of us would weigh one more heavily and one would weigh the other more heavily. I happen to be very fond of views. But, other people don't seem to give a darn about views.

How do you compare the economic advantage of a more or less straight line to the extra cost of a more [11] zig zag line with more different accesses from the roads. How much weight do you give that?

What weight do you give the extra cost of building with higher towers, with more silhouette and a higher cost against the value of having only one corridor. My conclusions on the relative weights might have been different, but, I cannot say that the plaintiff's decision in one group of factors outweigh another, it wasn't abuse of discretion.

The decision I found most compelling was the decision

of Judge Day. I happen to have known Judge Day from some work in one of the Bar Associations' Committees. I know him to be a man of great ability, a man who was very conscious of the rights of individuals. A man with a great deal of breadth, in my opinion.

The interesting thing about his decision in Cleveland Electric Illuminating versus Carl Lesher, is the fact that although he, this was a route as you know that went through a park and his decision was that he and Judge Locher had decided in the lower Court that this park unreasonably affected the welfare of the general public. That was his decision in the trial of Court and despite the fact that Day refused to upset this decision he said that Judge Locher made the decision and he was the trier of fact and he backed it up. At the same time he held that this was not, of running [12] this line through this park was not an abuse of discretion and by the Board of Directors of the Illuminating Company. In other words, he held, he said, "Without adopting an extreme definition of abuse of discretion seems to us enough to determine the issue, if the evidence shows the Board of Directors made a reasoned and good faith effort to exercise the discretion given it by the revised code."

Whether the product of that action was the best conceivable decision, or whether we, or the Court below agreed with it, or would have made a different judgment on the same evidence is beside the point.

In other words, basically the Gas and Electric Company is a lower court and as long as they don't abuse their discretion, I as a Judge in this Court don't have any right, even though I may think they made the wrong decision. I do not have the right to set aside that conclusion and that my conclusion, that the different route would have been better does not imply an abuse of discretion on their part.

So, we conclude that the plaintiffs have not abused their discretion under 163.09 (B). They are entitled to their appropriation. They have shown its necessity.

COURT OF COMMON PLEAS
HAMILTON COUNTY, OHIO

Nos. A-751384-86

CINCINNATI GAS & ELECTRIC COMPANY, et al.,
Plaintiffs,

vs.

EARL M. POPE, et al.,
Defendants.

ENTRY DETERMINING RIGHT TO TAKE

February 8, 1977

This cause came on to be heard on the pleadings and the evidence and the oral arguments of counsel on the issue of necessity relating to the location of the route of the proposed line and to acquire a right of way over the property of each of the defendants, the Court having heretofore determined that the defendants have failed to establish their defense that the plaintiffs had not negotiated in good faith or that the line was not necessary. On consideration of all of the evidence and the arguments of counsel, the Court finds and determines that the defendants have failed to establish that the plaintiffs have been guilty of an abuse of discretion in determining the necessity to acquire a right of way over the property of each of the defendants.

IT IS, THEREFORE, CONSIDERED, ORDERED AND ADJUDGED, that the plaintiffs are entitled to acquire a right of way over a property of each of the defendants as described in the Complaint upon the determination by a jury on the basis of the evidence to be introduced of the amount of compensation to which each of the defendants is entitled for the right of way so acquired.

IT IS FURTHER ORDERED that this case be set for trial by a jury as provided by law.

To which the defendants by their counsel hereby except.

HAVE SEEN:

BEIRNE & WIRTHLIN

By .....

C. R. Beirne
2912 Carew Tower, 441 Vine St.
Cincinnati, Ohio 45202
(513) 621-5370

Attorneys for Plaintiffs

ROBERT E. MANLEY

By .....

4500 Carew Tower, 441 Vine St.
Cincinnati, Ohio 45202
(513) 721-5525

Attorney for Defendants

IN THE COURT OF APPEALS
FIRST APPELLATE DISTRICT OF OHIO
HAMILTON COUNTY, OHIO

NOS. C-77107, C-77113, C-77114

CINCINNATI GAS & ELECTRIC CO., ET AL.,
Plaintiffs-Appellees,

vs.

EARL M. POPE, ET AL.,
Defendants-Appellants.

ENTRY OF DISMISSAL

May 3, 1977

This cause came on to be heard by the Court upon the motion of the appellees for an order of this Court dismissing the appeal, the memorandum in opposition thereto, and upon the reply memorandum, and

The Court, being fully advised in the premises, finds that said motion is well taken and that the same ought to be and is hereby granted.

Wherefore it is Ordered and Decreed that the appeal is dismissed and all other pending motions are hereby overruled as being moot.

It is further Ordered that a certified copy of this judgment shall constitute the mandate to the Common Pleas Court of Hamilton County, Ohio, pursuant to Rule 27, Ohio Rules of Appellate Procedure.

THE CINCINNATI GAS & ELECTRIC COMPANY ET AL., APPELLEES, *v.* POPE ET AL., APPELLANTS.

[Cite as Cincinnati Gas & Electric Co. v. Pope (1978), 54 Ohio St. 2d 12.]

Appropriation of property—Appropriation order—Appealable, when.

A trial court's order in favor of an appropriating agency, entered pursuant to R. C. 163.09 (B), is not subject to immediate appellate review; rather, the property owner may seek appellate review only after a jury has assessed compensation and damages and the trial court enters an order, pursuant to R. C. 163.15, which disposes of the whole case. (R. C. 163.09 and 163.19 construed.)

(No. 77-695—Decided April 5, 1978.)

APPEAL from the Court of Appeals for Hamilton County.

In February 1975, Cincinnati Gas & Electric Company and The Dayton Power & Light Company (hereinafter appellees) filed petitions for appropriation, pursuant to R. C. 163.05, naming appellants, Earl and Dolores Pope, Edwin and Dolores O. Pope, and Edith Pope, as owners of three contiguous parcels of property located in western Hamilton County. By these complaints appellees sought to acquire an easement across appellants' properties, for the purpose of constructing a high-voltage electric transmission line.[1]

---

[1] The three cases were consolidated for trial and have been consolidated for the purpose of appellate review by both the Court of Appeals and this court.

The cases were tried to the Court of Common Pleas of Hamilton County during several days in September 1976, and January 1977. On January 18, 1977, the trial court entered an oral opinion, finding that appellees were entitled to appropriate the easements which they sought. Subsequent to this ruling, but prior to an assessment of compensation by a jury, as provided for in R. C. 163.14,[2] appellants filed notices of appeal. Appellees filed a motion to dismiss the appeal, and on May 3, 1977, the Court of Appeals granted said motion.

The cause is now before this court pursuant to the allowance of a motion to certify the record.

Messrs. Beirne & Wirthlin, Mr. C. R. Beirne and *Mr. Michael A. Fulton,* for appellees.

Mr. Robert E. Manley, Mr. Joseph R. Jordan and *Mr. Timothy A. Fischer,* for appellants.

CELEBREZZE, J. The sole question presented for our determination is whether a Court of Appeals has jurisdiction to review a lower court's order, entered pursuant to R. C. 163.09 (B), in favor of an appropriating agency on one or more of the preliminary issues relative to appropriation, *i. e.,* the condemnor's right to make an appropriation, the inability of the owners and the condemnor to

---

[2] R. C. 163.14, in pertinent part, provides as follows:

"In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

"The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. • • •

"The verdict shall be signed by at least three-fourths of the members of the jury.

"If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment."

agree upon monetary compensation, and the necessity for a particular appropriation.

R. C. 163.09 (B) provides as follows:

"When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. *An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal. An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal.* If a public agency has taken possession prior to such order and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (B)

of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents." (Emphasis added.)

The foregoing statute expresses a legislative resolution that the trial court's order in favor of the appropriating agency is not immediately appealable by the property owner, whereas the trial court's order against the agency is a final order which the agency may appeal.

Appellants contend that the General Assembly may not limit or abridge the power or the right of appellate courts to review judgments of the Court of Common Pleas, and that any such legislative attempt is unconstitutional and void. We disagree. The appellate jurisdiction of the Courts of Appeals is set forth in Section 3 (B) (2), Article IV of the Ohio Constitution, as follows:

"Courts of appeals shall have such jurisdiction *as may be provided by law* to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies." (Emphasis added.)

The above section of the Constitution was adopted on May 7, 1968, and its provisions are closely analogous to the amended version of former Section 6, Article IV of the Ohio Constitution. However, when originally enacted, Section 6 of Article IV read as follows:

"The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and appellate jurisdiction in the trial of chancery cases, and, to review, affirm, modify, or reverse the judgments of the courts of common pleas, superior courts and other courts of record within the district as may be provided by law. * * *"

On January 1, 1945, the following amendment became effective:

"The courts of appeals shall have original jurisdiction in quo warranto, mandamus, habeas corpus, prohibition and procedendo, and *such jurisdiction as may be provided by law* to review, affirm, modify, *set aside,* or reverse judgments *or final orders of boards, commissions, officers, or tribunals,* and *of* courts of record *inferior to the court of appeals* within the district, * * *." (Emphasis supplied to indicate new language.)

In *Youngstown Municipal Ry. Co.* v. *Youngstown* (1946), 147 Ohio St. 221, this court construed the then recent amendment, at page 223, as follows:

"* * * The expressed intention is to accomplish the simple result of empowering the General Assembly to change the appellate jurisdiction of the Courts of Appeals if it should desire so to do; and unless and until there is such legislative action, the appellate jurisdiction of the Courts of Appeals remains as it was at the time the amendment was adopted."

In *Klein* v. *Bendix-Westinghouse Co.* (1968), 13 Ohio St. 2d 85, decided approximately two months before Section 6, Article IV was repealed and reenacted as Section 3, Article IV, this court was presented with the question of whether a discovery order of a trial court was subject to immediate appellate review. In the course of deciding that it was not, the court, per Paul W. Brown, J., stated the following:

"The attitude of this court has long been that the definition of final orders is within the judicial province. *Hoffman* v. *Knollman,* 135 Ohio St. 170; *Price* v. *McCoy Sales & Service, Inc.,* 2 Ohio St. 2d 131. By constitutional declaration, it is within the legislative province to specify which final orders are appealable. Section 6, Article IV,

Ohio Constitution. The case of *Youngstown Municipal Ry. Co.* v. *Youngstown,* 147 Ohio St. 221, holds that all orders falling within this court's definition of final orders are appealable until the General Assembly acts to modify the jurisdiction of the Courts of Appeals."

The *Klein* court also stated that R. C. 2505.02 constituted a legislative restatement of this court's definition of a final order.

We note that R. C. 2505.02 declares that "* * * an order affecting a substantial right made in a special proceeding * * * is a final order which may be reviewed, affirmed, modified, or reversed, with or without retrial." Under the above definition a trial court's order determining the preliminary issues in favor of the appropriating agency would appear to be a final order, since the order is made in a special proceeding and it will certainly affect the owner's property rights. Nevertheless, all final orders are not *ipso facto* appealable orders, and the distinction made in *Klein* is supported by the following language in R. C. 2505.03: "Every final order, judgment or decree of a court * * * may be reviewed * * * unless otherwise provided by law * * *."

Clearly, in enacting R. C. 163.09, the General Assembly has "otherwise provided by law" that a trial court's order in favor of the appropriating agency on the preliminary questions is not immediately appealable. Rather, we believe that the statutory scheme of R. C. Chapter 163 contemplates that the property owner may obtain appellate review only after the preliminary issues are decided by the trial court, a jury assesses compensation pursuant to R. C. 163.14, and a journal entry which reflects both the decision on the preliminary issues and the amount of the jury award is made by the trial court, pursuant to R. C. 163.15. The legislative motivation for so designing condemnation proceedings is apparent, because only after a judgment is entered under R. C. 163.15 are all the rights of the parties adjudicated. The resulting consolidation of issues on appeal thus precludes piecemeal litigation, thereby fostering the conservation of judicial energy while at the same time eliminating unnecessary delays.

In our opinion R. C. 163.09 (B) indicates a legislative decision that the property owner be denied an immediate appeal on the preliminary issues relative to appropriation. Because the General Assembly has the constitutional authority to make such a decision, appellant's first argument must be rejected.

An additional argument advanced by appellants is that the operation of R. C. 163.19 renders meaningless appellate review of the trial court's decision on the preliminary issues, thereby depriving appellants of the due process of law guaranteed by the Fourteenth Amendment to the United States Constitution and Section 16, Article I of the Ohio Constitution.

R. C. 163.19 states the following:

"Subject to sections 163.07 and 163.09 of the Revised Code, any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the right to take and use the property appropriated shall not be affected by such review by the appellate courts."

The due process of law to be observed whenever private property is appropriated for public use is set forth in Section 19, Article I of the Ohio Constitution, which states, in pertinent part:

"* * * [W]here private property shall be taken for public use, a compensation therefor shall first be made in money, or first secured by a deposit of money; and such compensation shall be assessed by a jury, without deduction for benefit to any property of the owner."

R. C. Chapter 163 will not deprive the appellants of the substantive due process of law specified in the above constitutional provision. The trial court has already determined that the property will be taken for a public use, and, upon remand of this cause, a jury will be selected to assess the compensation and damages to be awarded to appellants. In addition, procedural due process is afforded within R. C. Chapter 163, since R. C. 163.07 requires that the property owner be notified that a petition for appropriation has been filed, and R. C. 163.09 assures the property owner of a due process hearing on the preliminary issues.

This court has repeatedly stated that there is no inherent right of appeal from a judgment of a court, and that such right must be conferred by Constitution or statute. *Middletown* v. *City Comm. of Middletown* (1941), 138 Ohio St. 596; *Lindblom* v. *Bd. of Tax Appeals* (1949), 151 Ohio St. 250; *In re Mahoning Valley Sanitary Dist.* (1954), 161 Ohio St. 259, certiorari denied, 348 U. S. 831.

The General Assembly has apparently decided that the health, safety and welfare of the general public will be promoted by the speedy construction of necessary public projects. R. C. 163.19 thus appears to be a compromise measure which preserves the property owner's traditional right to appellate review of the trial court's findings on the preliminary issues, but which also grants to the appropriating agency the right to take and use the appropriated property while such appellate review is pending. Accord *Ornstein* v. *Chesapeake & Ohio Ry. Co.* (1931), 123 Ohio St. 260.

We see no necessary inconsistency in the provisions of R. C. 163.19. In the majority of appeals in appropriation cases there would be no reason to delay construction of a public project when only the jury award of compensation is contested. In those rare instances where the property owner successfully appeals the preliminary issues of the right to take and the necessity for the take, the title to the property previously conferred upon the appropriating agency, under R. C. 163.15, is thereupon subject to defeasance. Finally, we recognize that because of the balance struck within R. C. 163.19 there is the possibility that the contested property might be damaged by the appropriating agency after it acquires title thereto under R. C. 163.15, only to be later restored, in this damaged condition, to the property owner who successfully appeals the preliminary issues. It is therefore imperative that the property owner who prosecutes an appeal on other than the jury award of compensation adequately inform the appellate court of his dilemma, so that the appellate court might implement the special provision of R. C. 163.22 which mandates that " [a]ll proceedings brought under sections 163.01 to 163.22, inclusive, * * * shall be advanced as a matter of immediate public interest and concern and shall be heard by the court at the earliest practicable moment."

The judgment of the Court of Appeals must be affirmed, and the cause is hereby remanded to the trial court so that compensation may be assessed.

Judgment affirmed.

O'NEILL, C. J., HERBERT, W. BROWN, P. BROWN, SWEENEY and LOCHER, JJ., concur.

STATUTES

OHIO REVISED CODE

§ 147 In enacting a statute, it is presumed that:

(A) Compliance with the constitutions of the state and of the United States is intended;

(B) The entire statute is intended to be effective;

(C) A just and reasonable result is intended;

(D) A result feasible of execution is intended.

§ 163.08 Any owner may file an answer to such petition. Such answer shall be verified as in a civil action and shall contain a general denial or specific denial of each material allegation not admitted. The agency's right to make the appropriation, the inability of the parties to agree, and the necessity for the appropriation shall be resolved by the court in favor of the agency unless such matters are specifically denied in the answer and the facts relied upon in support of such denial are set forth therein, provided, when taken in time of war or other public exigency, imperatively requiring its immediate seizure or for the purpose of making or repairing roads, which shall be open to the public, without charge, an answer may not deny the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation. Any answer shall be filed on or before the third Saturday after the return day of the summons or service by publication as set forth in section 163.07 of the Revised Code. No extension of time for filing of an answer shall be granted.

§ 163.09 (A) If no answer is filed pursuant to section 163.08 of the Revised Code, nor approval ordered by the court to a settlement of the rights of all necessary parties,

the court on motion of a public agency shall declare the value of the property taken and the damages, if any, to be as set forth in any document properly filed with the clerk of courts by the public agency. In all other cases the court shall fix a time, within twenty days from the last date that such answer could have been filed, for the assessment of compensation by a jury.

(B) When an answer is filed pursuant to section 163.08 of the Revised Code, and any of the matters relating to the right to make the appropriation, the inability of the parties to agree, or the necessity for the appropriation are specifically denied in the manner provided in such section, the court shall set a day, not less than five nor more than fifteen days from the date the answer was filed to hear such questions. Upon such questions, the burden of proof is upon the owner. A resolution or ordinance of the governing or controlling body, council, or board of the agency declaring the necessity for the appropriation shall be prima-facie evidence of such necessity in the absence of proof showing an abuse of discretion by the agency in determining such necessity. If as to any or all the property or other interests sought to be appropriated, the court determines the questions in favor of the agency, the court shall set a time for the assessment of compensation by the jury within twenty days from the date of the journalization of such determination. An order of the court in favor of the agency on any of such questions or on qualification under section 163.06 of the Revised Code, shall not be a final order for purposes of appeal. An order of the court against the agency on any of such questions, or on the question of qualification under section 163.06 of the Revised Code, shall be a final order for purposes of appeal. If a public agency has taken possession prior to such order

and such order, after any appeal, is against the agency on any of such questions, the agency shall restore the property to the owner in its original condition or respond in damages, which may include the items set forth in division (B) of section 163.21 of the Revised Code, recoverable by civil action, to which the state consents.

(C) When an answer is filed pursuant to section 163.08 of the Revised Code, and none of the matters set forth in division (B) of this section is specifically denied, the court shall fix a time within twenty days from the date the answer was filed for the assessment of compensation by a jury.

(D) If answers are filed pursuant to divisions (B) and (C) of this section, or an answer is filed on behalf of fewer than all the named owners, the court shall set the hearing or hearings at such times as are reasonable under all the circumstances, but in no event later than twenty days after the issues are joined as to all necessary parties or twenty days after rule therefor, whichever is earlier.

(E) The court may, with the consent of the parties, order two or more cases to be consolidated and tried together, but the rights of each owner to compensation, damages, or both shall be separately determined by the jury in its verdict.

§ 163.14 In appropriation proceedings the jury shall be sworn to impartially assess the compensation and damages, if any, without deductions for general benefits as to the property of the owner.

The jury, in its verdict, shall assess the compensation for the property appropriated and damages, if any, to the residue, to be paid to the owners. When a building or other structure is on the property appropriated or when a

building or other structure is situated partly upon the land appropriated and partly upon adjoining land so that the structure cannot be divided upon the line between such lands without manifest injury thereto, the jury, in assessing compensation to any owner of the land, shall assess the value thereof, as part of the compensation. The title to said structure shall vest in the agency which shall have the right to enter upon the adjoining land upon which any part of the structure is located for the purpose of removing said structure therefrom, after deposit in accordance with the verdict. Such removal shall be made within ninety days after taking title to the property appropriated; provided, that the court may extend removal time upon such conditions as the court requires.

The verdict shall be signed by at least three-fourths of the members of the jury.

If a jury is discharged without rendering a verdict, another shall be impaneled at the earliest convenient time and shall make the inquiry and assessment.

§ 163.15 As soon as the agency pays to the party entitled thereto or deposits with the court the amount of the award and the costs assessed against the agency, it may take possession; provided, that this shall not be construed to limit the right of a public agency to enter and take possession, as provided in section 163.06 of the Revised Code. When the agency is entitled to possession the court shall enter an order to such effect upon the record and, if necessary, process shall be issued to place the agency in possession. Whenever a final journal entry in an appropriation proceeding, granting to this state a fee title or any lesser estate or interest in real property is filed and journalized by the clerk of courts, the clerk of courts shall forthwith transmit to the county auditor a certified copy of said

final journal entry who shall transfer the property on his books and transmit said entry with proper endorsement to the county recorder for recording. The costs of filing such final journal entry with the county auditor and the county recorder shall be taxed as costs in the appropriation proceedings the same as other costs are taxed under section 163.16 of the Revised Code.

§ 163.19 Subject to sections 163.07 and 163.09 of the Revised Code, any party may prosecute appeals as in other civil actions from the judgment of the court. The trial court upon proper terms may suspend the execution of any order; but in all cases where the agency pays or deposits the amount of the award assessed and gives adequate security for any further compensation and costs, as required by the court, the right to take and use the property appropriated shall not be affected by such review by the appellate courts.

MAGNA CARTA

39. Nullus liber homo capiatur, vel imprisonetur, aut dissaisiatur, aut utlagetur, aut exuletur, aut aliquo modo destruatur, nec super eum ibimus, nec super eum mittemus, nisi per legale judicium parium suorum vel per legem terrae.

[Generally accepted translation: No free man shall be taken, or imprisoned, or disseized, or outlawed, or exiled, or in any way harmed — nor will we go upon or send upon him — save by the lawful judgment of his peers or by the law of the land.]